NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

GLENN HUNTER, Plaintiff/Counterdefendant/ Appellant, v. ROSEMARY PEREZ, Defendant/Counterclaimant/ Appellee.	2 CA-CV 2007-0095 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CV200500984

Honorable William J. O'Neil, Judge

AFFIRMED

Gove L. Allen — Mesa
Attorney for Plaintiff/Appellant

Rosemary Perez — Apache Junction
In Propria Persona

E S P I N O S A, Judge.

¶1 Appellant Glenn Hunter appeals from a judgment denying relief on his contract claims against appellee Rosemary Perez and awarding Perez compensatory damages, punitive damages, and attorney fees on her counterclaim against Hunter for assault, conversion, nuisance, and intentional infliction of emotional distress.

¶2 Initially, we note that Perez's responsive submission is a brief narrative statement instead of an answering brief,[1] which Hunter urges us to construe as a confession of error. However, that doctrine is discretionary, and we are reluctant to reverse based on an implied confession of error when, as here, the trial court has correctly applied the law. *See Nydam v. Crawford*, 181 Ariz. 101, 101, 887 P.2d 631, 631 (App. 1994); *Gonzales v. Gonzales*, 134 Ariz. 437, 437, 657 P.2d 425, 425 (App. 1982) (court may—but is not required to—regard failure to respond as confession of reversible error); *Bugh v. Bugh*, 125 Ariz. 190, 191, 608 P.2d 329, 330 (App. 1980) (neither rules nor cases compel reversal when no answering brief filed even if there is debatable issue). All of the evidence before the trial court is contained in the record and we exercise our discretion to consider the case on its merits.

Factual and Procedural Background

¶3 We view the evidence and all reasonable inferences in the light most favorable to upholding the trial court's decision. *Double AA Builders, Ltd. v. Grand State Constr.*

[1]Perez's pleading states, "I believe that the Trial Court heard the evidence and ruled correctly," and asks this court to review the transcript and affirm the trial court's ruling.

L.L.C., 210 Ariz. 503, ¶ 9, 114 P.3d 835, 838 (App. 2005). Perez and Hunter met in 2003. Perez owned horses and horse property where she taught riding lessons. Between late March 2005 and early June, Hunter lived with Perez on her property. In July, after Perez had ended their relationship, Hunter filed a civil complaint seeking the return of multiple items of personal property he had left on Perez's property but allegedly could not retrieve without violating an order of protection Perez had obtained. Hunter also sought to accelerate a debt Perez owed him and to determine an interest rate for that debt. Perez answered and counter-claimed seeking damages for assault, conversion, nuisance, and intentional infliction of emotional distress.

¶4 At the beginning of trial, Hunter narrowed his claims to seek only interest on the debt and possession of a metal shed, two plastic water barrels, a sixty-five-gallon water tank or barrel, and a weed eater.[2] Hunter did not testify that he and Perez ever had an agreement about interest on the $7,000 debt, nor did he testify the debt had been a loan to Perez. She testified that Hunter had suggested installing the shed and that, when she had stated she could not afford it, he responded that "[he] would put it up." When she asked what would happen "when you move and go on down the road," he had replied, "[Y]ou can have it."

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[2]Without Hunter's claim for interest, the value of his action was approximately $620, which is below the jurisdictional limit for an action in the superior court. *See State ex rel. Neely v. Brown*, 177 Ariz. 6, 8, 864 P.2d 1038, 1040 (1993) ("The provisions of art. 6, § 14(3) assign to the superior court 'original jurisdiction' in all cases in which the amounts in controversy exceed $1,000.").

¶5 Perez testified she eventually offered Hunter $7,000 to compensate him for the shed and for a dog run he had constructed. She had made the offer, she stated, just to "get him out of her life," even though she thought it was more than the items were worth. The dog run was constructed with posts set in concrete, and the shed could not be removed without damaging other structures on the property. Although Hunter had refused to sign the agreement Perez had prepared and signed, she was paying him $200 per month and had paid approximately $4,000 by the time of trial. Perez also testified she was willing to allow Hunter to retrieve his personal property, provided that she be present when he did so. Before trial, Perez had returned to court and secured a modification of the protective order against Hunter so he could retrieve his property on that condition.

¶6 Perez testified about an incident in June 2005 in which Hunter had become very angry, and she had feared he might drive away with her purse in the truck.[3] When she had attempted to retrieve the purse, he reacted by "screaming," waving "his fist," and using both hands to physically "thr[o]w" her out of the truck.[4] At the time, she had a cast on one leg, and she had fallen to the ground. She also testified about other incidents of physical abuse and intimidation by Hunter. Hunter admitted he had "removed her from [the] truck." Perez repeatedly stated she was afraid of Hunter and apparently became visibly distressed

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[3]Perez testified that, on a previous occasion, Hunter had left "with [her] purse in the truck, with [her] credit cards and everything."

[4]At the time of trial, Hunter was sixty and Perez was sixty-four. Hunter was described as six feet tall and weighing approximately 190 pounds.

during her testimony. She stated she believed Hunter's actions were malicious and that he had harmed her both physically and emotionally.

¶7 After the June 2005 episode, Perez obtained an order of protection to prevent Hunter from returning to her property. He then returned with an Apache Junction police officer and removed not only his own property but some of Perez's property as well. She testified she spent $600 to replace missing items, which she needed in order to teach her riding classes. Perez further stated Hunter had sent third parties onto her property to remove other items, had sent her a bouquet of "dead roses with black tissue," would "go to the back neighbors' place and watch [her] over the fence," and had deliberately ridden by her house on several occasions, including on Christmas Day, while wearing her late husband's chaps. She also testified that, between March and June, Hunter continually pressured her to add his name to the titles to her properties and that he was "trying to put a lien on [her property]" despite her having made regular payments to him.[5]

¶8 Hunter admitted the details of the Christmas Day ride but claimed the chaps had since been stolen so he could not return them to Perez. He also acknowledged he had disposed of her late husband's saddle, although Perez testified she had not given him permission to do so. Additionally, Hunter admitted asking Perez's next-door neighbor to remove certain property for him after the protective order had been issued. Finally, when

[5]In opening statement, Perez's counsel stated that this real property "was land that Mr. Hunter had tried to purchase and couldn't." Hunter did not dispute this assertion, and Perez testified she believed he was still trying to obtain her property at the time of trial.

asked about a written memorandum of the $7,000 debt prepared and signed by Perez, Hunter stated: "I would never sign that."

¶9 Since these events, Perez testified, she had required therapy and medication to prevent panic attacks and "couldn't seem to quit crying." Her distress had prevented her from giving riding lessons for "a month or two," and her court appearances had also forced her to cancel lessons.

¶10 At the conclusion of the evidene, the parties elected to submit written closing arguments. The trial court subsequently ruled against Hunter, found that he had asserted his claims in bad faith, and ruled in favor of Perez on her counterclaim. The court awarded her an aggregated total of $5,000 in compensatory damages on her claims for assault, conversion, and intentional infliction of emotional distress. It further awarded Perez $5,000 in punitive damages and $9,786 for her attorney fees.

Discussion

¶11 Hunter challenges a number of the trial court's factual findings. We will uphold such findings unless they are clearly erroneous. *See Gerow v. Covill*, 192 Ariz. 9, ¶ 24, 960 P.2d 55, 61 (App. 1998). Factual findings are clearly erroneous if "they are unsupported by substantial evidence." *Felder v. Physiotherapy Assocs.*, 215 Ariz. 154, ¶ 72, 158 P.3d 877, 891 (App. 2007). Because neither Hunter nor Perez requested findings of fact pursuant to Rule 52(a), Ariz. R. Civ. P., "we must presume that the trial court found every fact necessary to support its judgment." *Double AA Builders*, 210 Ariz. 503, ¶ 9, 114 P.3d

at 838. We will affirm the judgment if "any reasonable construction of the evidence justifies it." *Id.* When conflicting evidence is presented at trial, we will not disturb the court's determinations of witness credibility or the appropriate weight to be given to particular evidence. *See Gutierrez v. Gutierrez*, 193 Ariz. 343, ¶ 13, 972 P.2d 676, 680-81 (App. 1998); *City of Sierra Vista v. Cochise Enters., Inc.*, 144 Ariz. 375, 381, 697 P.2d 1125, 1131 (App. 1984).

¶12 Hunter first challenges the trial court's finding that he had abandoned the shed, water barrels, and water tank. The court reasoned that, "if such property was existent upon [Perez's] property, [Hunter] was given more than ample opportunity to return and gain that property." The court also noted Hunter had not "demonstrated to this court's satisfaction that either the blue plastic barrels or the 65-gallon water tank were purchased by him." Hunter admits in his brief that "[prior] to November 26, 2005 [Perez] modified the order of protection to facilitate the removal of [Hunter's] property." The trial in this action occurred in October 2006, and Perez testified Hunter had never personally attempted to recover the property.

¶13 Relying on *Fields v. Steyeart*, 21 Ariz. App. 30, 515 P.2d 57 (1973), Hunter argues property cannot be abandoned while an action to recover it is being maintained. However, *Fields* held that a tow truck driver who had removed a disabled vehicle after an accident did not have a valid lien pursuant to A.R.S. § 33-1022(B), the abandoned vehicle statute. As a result, the vehicle could not be deemed abandoned and sold to pay the storage

charges. *Fields*, 21 Ariz. App. at 31, 515 P.2d at 58. That reasoning is not applicable to the situation here. Because the evidence showed Hunter had failed to retrieve his property for at least eleven months when he had the opportunity to do so, the trial court could reasonably infer that he did not intend to and thus had abandoned it. *See Double AA Builders*, 210 Ariz. 503, ¶ 9, 114 P.3d at 838 (judgment affirmed if supported by any "reasonable construction of the evidence").

¶14 Hunter next challenges the court's finding that the parties' agreement that Perez would pay him $7,000 did not include interest. He relies on A.R.S. § 44-1201(A), which provides for a statutory interest rate. But he has not directed us to any portion of the record where he raised this argument in the trial court and, after reviewing the transcript, we note Hunter never testified he and Perez had even discussed, let alone agreed, that she would pay interest on the $7,000. After hearing the evidence, the trial court accepted Perez's testimony and found that the express agreement between Hunter and Perez called for repayment of $7,000 at $200 per month without interest. Hunter mischaracterizes the record by asserting the evidence was "uncontradicted." Perez testified the improvements made by Hunter himself or at his direction were worth approximately $5,800, but Perez had agreed to the $7,000 "just to keep from an argument." Based on this evidence, we cannot say the trial court erred in finding there was no agreement for Perez to pay interest on the $7,000 and in rejecting Hunter's claim.

¶15 Hunter next contends the trial court's finding that he had struck Perez in the face "when removing her from his pickup" was clearly erroneous. But there is evidence in the record to support the trial court's ruling. Although Perez's testimony about the incident was not a model of clarity,[6] she stated she remembered "his fist in my face" and, on cross-examination, stated, "I saw his fist while he was screaming, and then the next thing I know I was airborne." Hunter's only statement about the incident was, "I removed her from my truck." Hunter did not deny having a physical encounter with Perez but declined to elaborate on it. Based on Perez's testimony, which Hunter did not refute, the trial court could reasonably infer Perez had been struck during the altercation.

¶16 Moreover, regardless of whether Hunter had hit Perez in the face, he admitted having physically "removed her from [his] truck." There was evidence of bruising on her arm the day after the event, and she testified she had been injured. She also said that she had a "cast on [her] leg" at the time and that "it was so awful." This testimony would support an award of damages for assault regardless of whether Hunter had also struck her in the face. Although he contends the force he used was not unreasonable, because specific Rule 52(a) findings were not requested, we presume the trial court found otherwise. *See Double AA Builders*, 210 Ariz. 503, ¶ 9, 114 P.3d at 838. Accordingly, even if the court erred in finding Hunter had struck Perez in the face, the error would not merit reversal.

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[6]The record suggests that Perez experienced emotional distress in relating the incident and incomplete recall of the entire episode.

¶17 Hunter also challenges the finding that he had converted some of Perez's personal property. Again, there was evidence to support this finding. After Hunter and the Apache Junction police officer had removed items from Perez's tack shed, she noted multiple tack items belonging to her were missing. She testified no one else had been on the property before she realized the items were gone and that it had cost her approximately $600 to replace them in order to continue teaching her riding classes. Although she could not specifically identify which items were missing,[7] she stated the only "high dollar" item taken was a "bosal" worth approximately $2,000. From this, as well as her testimony that she had had to spend roughly $600 to replace missing tack items, the court could reasonably infer Hunter had converted the property and could award Perez damages.

¶18 Hunter next asserts the trial court erred in finding he had intentionally inflicted emotional distress on Perez. He specifically challenges the court's statement that he had "intentionally inflicted emotional distress by taking [Perez's] late husband's chaps and wearing them on Christmas Day in such fashion that she would see them and be impacted."

¶19 Hunter again mischaracterizes the record when he claims Perez testified merely that his actions "upset her." Perez responded affirmatively when her lawyer asked whether Hunter's actions at Christmas 2005 had "caus[ed her] to be upset." But in earlier questioning, she had indicated she "believe[d Hunter] is malicious" and that he had continued

[7]Perez testified she had been teaching riding for over thirty years and had not memorized all of the equipment she had acquired.

to "demonstrate[] maliciousness towards [her]." The Christmas incident was merely one in a series of events Perez described that suggested Hunter intended to cause her emotional distress. As noted earlier, he had also sent third parties onto her property to remove items, had sent her a bouquet of "dead roses with black tissue," had gone to "the back neighbors' place and watch[ed her] over the fence." He also had moved into a residence "about 900 feet away from [her]," and had deliberately ridden past her house on other occasions after the order of protection was in place.

¶20 Again, because factual findings were not requested, we presume the trial court found every fact necessary to support its ruling. Perez testified about Hunter's actions, about panic attacks she began experiencing after he assaulted her, and about medication she was still taking to suppress those panic attacks. She had also been unable to teach her riding students for a period of time because she "could not stop crying," and she had seen her doctor every two to three weeks since shortly after the assault. It was for the trial court to evaluate Perez's testimony, but the symptoms she described were sufficient to permit the court to find that she had suffered severe emotional distress. *See Pankratz v. Willis*,155 Ariz. 8, 17, 744 P.2d 1182, 1191 (App. 1987) (plaintiff must suffer genuine, extreme distress; but it need not be disabling or result in "bodily harm"). And, because the court could infer from the evidence that Hunter had intended to cause Perez distress, we cannot say it erred. *See Double AA Builders*, 210 Ariz. 503, ¶ 9, 114 P.3d at 838.

¶21 Hunter next claims there was no evidence of lost earnings to support the trial court's award of damages. The record, however, contains Perez's testimony that she had canceled scheduled lessons "for about a month or two" after the incident and for repeated court appearances. She also testified she usually gave lessons to "ten or [twelve] kids a day at $37 a head." Her testimony provided evidence of lost earnings, and the trial court did not err. *See id*.

¶22 Hunter also contests the lump sum damages award to Perez and contends it was improper. He argues, based on the "single award" for the three separate claims of assault, intentional infliction of emotional distress, and conversion, that we must remand the case for a new determination of damages if we reverse the trial court on any of the individual claims. As discussed above, Perez was entitled to damages on each of her claims, and those claims were adequately supported by the evidence. There is no need to further address Hunter's arguments based on this premise.

¶23 Hunter next challenges the trial court's award of attorney fees, claiming the court erred in ruling that Perez's tort claims "[arose] out of breach of the contract" for the purpose of awarding Perez fees. In Arizona, when "a contract was a factor causing the dispute," an action is based in contract for purposes of A.R.S. § 12-341.01(A). *ASH, Inc. v. Mesa Unified Sch. Dist. No. 4*, 138 Ariz. 190, 192, 673 P.2d 934, 936 (App. 1983). Hunter initially brought Perez into court based on an asserted contract between them; thus, under *ASH*, § 12-341.01(A) arguably applies. But we need not resolve this issue because, even

assuming Perez's claims do not qualify under *ASH*, the trial court implicitly awarded attorney fees as a sanction for Hunter's bad faith.

¶24 Section 12-341.01(C), A.R.S., permits a court to award "reasonable attorney fees in any contested action upon clear and convincing evidence that the claim or defense constitutes harassment, is groundless and is not made in good faith." The trial court specifically found Hunter had acted in bad faith based on his conduct in "prosecuting this action in contract and asserting the multiple allegations that were untrue regarding that contract." Because Hunter presented no evidence to support his contentions that he was entitled to either a lump-sum accelerated payment or interest, we cannot say the court erred in concluding Hunter knowingly brought those claims in bad faith, and in awarding attorney fees to deter similar conduct in the future. "Bad faith may be found in the conduct of litigation as well as the conduct that gives rise to the litigation." *London v. Green Acres Trust*, 159 Ariz. 136, 146, 765 P.2d 538, 548 (App. 1988).[8]

¶25 We lastly consider Hunter's claim that the trial court erred in basing its award of attorney fees on Hunter's prelitigation activities "attempt[ing] to coerce [Perez] into placing his name upon the title to the Apache Junction property." But the trial court relied on that conduct only in finding Hunter's actions were "outrageous," "guided by an 'evil hand,'" and "truly reprehensible" as the basis for its award of punitive damages, not attorney

[8]In view of our determination that the trial court's attorney fees award was justified as a sanction under § 12-340.01(C), we need not address Hunter's additional argument that the court erred in not apportioning and deducting any fees related to non-contract issues.

fees. Because Hunter has not challenged the punitive damages award beyond asserting that Perez was not entitled to actual damages on her underlying claims, we do not address this issue further except to note the trial court's findings regarding Hunter's conduct support an award of punitive damages.[9]

¶26 The judgment of the trial court is affirmed. Hunter seeks attorney fees on appeal, but because he is not the prevailing party, his request is denied.

PHILIP G. ESPINOSA, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

GARYE L. VÁSQUEZ, Judge

[9]Punitive damages are appropriate when, as the trial court found here, the tortfeasor's conduct "'was guided by evil motives or wilful or wanton disregard of the interests of others.'" *Saucedo ex rel. Sinaloa v. Salvation Army*, 200 Ariz. 179, ¶ 10, 24 P.3d 1274, 1277 (App. 2001), *quoting Piper v. Bear Med. Sys., Inc.*, 180 Ariz. 170, 180, 883 P.2d 407, 417 (App. 1993); *see also Hyatt Regency Phoenix Hotel Co. v. Winston & Strawn*, 184 Ariz. 120, 132, 907 P.2d 506, 518 (App. 1995).